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No. 87-1722

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1987

WILLIAM G. BARNHART AND LINDA BARNHART,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

APPELLEE'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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QUESTIONS PRESENTED

1. Does the Free Exercise clause of the First Amendment of the United States Constitution bar the criminal prosecution of parents in the death of a child for failure to provide conventional medical care where the parents are members of an established fundamental church which teaches healing through prayer, anointing, and spiritual means?

2. Are Section 2504, entitled Involuntary Manslaughter, and Section 4304, entitled Endangering The Welfare Of Children, of Title 18 of the Pennsylvania Crimes Code of 1972, as amended, unconstitutionally vague?

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HISTORY OF THE CASE

Justin Robert Barnhart was born on March 20, 1979, at his home at R. D. #1, Flinton, Pennsylvania. He died there on September 10, 1981, as a result of a Wilm's Tumor. A Wilm's Tumor is a cancerous growth which starts in immature cells that normally become mature renal (kidney) cells. It normally occurs in

children from infancy to age fifteen. It is rare in older people and is very different from adult kidney cancer. No causes of Wilm's Tumor have been discovered. However, in the past sixty years, the medical profession has made great strides in the diagnosis and treatment of the Wilm's Tumor. These great strides have changed the outlook from a 90% death rate in the early twentieth century to the 90% survival rate now possible with modern management. The Wilm's Tumor has been the subject of two national studies referred to as National Wilm's Tumor Study (N.W.T.S.) - I. and National Wilm's Tumor Study (N.W.T.S.) - II.

Justin Robert Barnhart did not receive the benefits of the extensive professional medical help available. His parents, William G. Barnhart and Linda Barnhart, are members of the Faith Tabernacle Congregation and profess to believe in a strict reading of the King James Version of the Bible, which includes prayer and anointing with oil, and do not believe in professional medical help. Although they

profess not to believe in professional medical help, both Mr. and Mrs. Barnhart have gone to a licensed dentist on many occasions and Mr. Barnhart admitted to receiving novocaine for some dental procedures. The Faith Tabernacle Congregation does not impose any sanctions on a person who chooses to use professional medical help, it being the individual choice of each member.

A Wilm's Tumor is commonly discovered by a parent or guardian bathing the child when the presence of a lump can be noticed in the stomach. This is precisely what was observed by Linda Barnhart in April of 1981. It was obvious that something was wrong and Justin was anointed by the pastor of the church in June of 1981, and again in September of 1981, a few days before he died. During that period of time the tumor grew to the size of eight and one-fifth inches in diameter and five and one-third pounds in weight, or the size of a volleyball, in a boy who was only three feet two inches tall. His stomach was the largest part of Justin's body. It was a condition readily

observable by an untrained eye that something was seriously wrong. The tumor robbed Justin's body of nourishment so that there was an extreme loss of body fat. His arms and legs were so thin as to outline the shape and markings of his bones. His skin was just hanging loose. Sidney Goldblatt, Pathologist at Conemaugh Valley Memorial Hospital, Johnstown, Pennsylvania, stated that Justin literally starved to death. It was estimated by Dr. Giulio J. D'Angio, the Director of the Childrens Cancer Research Center of the Childrens Hospital in Philadelphia, Pennsylvania, that Justin's chances of survival were 90% had the tumor been treated when it was discovered. Dr. D'Angio further testified, with a reasonable degree of medical certainty, that even on the day Justin died, had he received professional medical help, which was available in the local area, his chances of survival were 20%.

On July 9, 1982, William G. Barnhart and Linda Barnhart were charged by the Pennsylvania State Police with Involuntary Manslaughter and

Endangering Welfare Of A Child. The information which led to the charges resulted from a cooperative investigation by the Pennsylvania State Police and the Cambria County District Attorney's Office as well as an Inquest conducted by the Cambria County Coroner on June 3, 1982, which resulted in a unanimous recommendation by the Jury that further legal process be brought as a result of this death.

The statutes provide:

Endangering welfare of children

> A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits a misdemeanor of the second degree if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S. Sec. 4304, and:

Involuntary manslaughter

> A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, he causes the death of another person.

18 Pa.C.S. Sec. 2504 (a).

Counsel for the Barnharts filed a Request For A Bill of Particulars requesting, in part, the following:

> "18. The exact manner and means engaged and employed by the defendants in causing the death of Justin Barnhart.
>
> 19. The specific law which imposes the duty of care which is alleged to have been violated by the defendants.
>
> 20. The specific details of the medical treatment which was allegedly not provided by the defendants.
>
> 21. The extent of medical treatment required by law and the defendants' "duty-of-care".

The Commonwealth responded as follows:

> "18. The exact manner and means engaged and employed by the defendants in causing the death of Justin Barnhart were their failure and omission to provide ordinary expert medical treatment for the apparent ailments of Justin Barnhart.
>
> 19. The duty to render care for one's child arises out of the relationship of parent and child. The right to receive medical care is

one created by natural law, attributable to the nature of mankind rather than to enactments of law. Various statutes of the Commonwealth of Pennsylvania impliedly recognize this natural right and corresponding duty by providing for remedies to ensure the welfare of children whose parents fail to provide reasonable medical care necessary for the child's health. The duty also arises out of common law.

20. The defendants failed to take Justin Barnhart to or have him examined by a person or persons who would be qualified to practice medicine in the Commonwealth of Pennsylvania or any other state to determine the nature of the apparent ailments being suffered by Justin Barnhart.

21. The exact extent of medical treatment required by law and the defendants' duty to care is that which an ordinary parent would under the same or similar circumstances provide for their child who was suffering from an obvious medical ailment."

A jury trial was held from March 9th through the 16th of 1983. The Jury returned verdicts of guilty against both defendants on all charges. After Motions For A New Trial And In Arrest Of Judgement were dismissed, Mr. and Mrs.

Barnhart were sentenced to probationary terms and appealed their convictions to the Pennsylvania Superior Court. The Superior Court affirmed the convictions and held that the convictions for Endangering the welfare of a child merge for purposes of sentencing with the convictions for involuntary manslaughter.

On January 14, 1988, the Pennsylvania Supreme Court denied the Barnhart's Petition for Allowance of Appeal on a Per Curiam Order.

REASONS FOR GRANTING, IN PART, AND DENYING, IN PART, A WRIT OF CERTIORARI

The first issue presented by William G. and Linda Barnhart, that of a religious defense, is the only issue which provides a basis for this Court's consideration to grant a Writ of Certiorari.

While it is the position of the Commonwealth of Pennsylvania that a parent has an affirmative duty to provide medical help to treat a life threatening

condition in a child who has no ability to speak for or care for himself, a review and affirmance by the highest court in our land of a decision of the Pennsylvania Superior Court will remove any hesitancy or doubt about the precedent set by a state court which has not dealt with the issue before.

The facts of Justin Barnhart's death and his parents criminal prosecution call for an exercise of this Court's power of supervision. The question of "making a martyr" out of one's child in the name of the First Amendment to the United States Constitution as discussed in **Prince v. Commonwealth of Massachusetts** 321 U.S. 158 (1944) is one that should be settled by the Supreme Court to provide the law enforcement and administrative agencies of all states with the legal guidance necessary to perform their statutory duties.

The second issue raised by the Barnharts, that of vagueness, does not likewise call for this Court's review. There are not presented special or important reasons for the Court's exercise of its power of supervision. The

Appellate Courts of Pennsylvania have not decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals. Neither does the vagueness issue present a question of federal law which has not been previously settled by this Court or have the Pennsylvania Appellate Courts decided a question in a way in conflict with applicable decisions of this Court. Appellates' claim that the "law" is vague and indefinite as applied to them in the context of parents raising their children within a particular religious order. They further contend that when the Commonwealth acts to limit basic freedom of religion, it must do so in clear unambiguous terms so that they know what conduct is prescribed.

As Judge Olszewski stated in the decision you are asked to review:

> "Appellants' vagueness challenge rests ultimately on the procedural due process requirement of notice. Due process requires a minimum degree of definiteness in the statutory prescription of standards, language which conveys "sufficiently definite warning

> as to the proscribed conduct when measured by common understanding and practices." **Jordan v. DeGeorge**, 341 U.S. 223, ____ (1951). Appellants were charged with consciously disregarding "a substantial and unjustifiable risk that death would result after observing the presence and continuous growth of a tumor in the stomach of Justin Barnhart which caused a continuous weight loss and which ultimately resulted in Justin Barnhart's death by starvation." At the coroner's inquest, appellant William G. Barnhart testified that he and his wife were aware of his son's condition: 'Well we realized he was going downhill and in his body - our little neighbor boy, Scotty Gates, died with leukemia and Justin seemed like he fell that same rut in that short time and it took a lot of faith to keep looking up.' William G. Barnhart's inquest testimony would indicate appellants knew Justin's death was imminent."

The Pennsylvania Supreme Court in the case of **Commonwealth vs. Mack**, 359 A.2d 770 (1976), ruled that Section 4304, Endangering The Welfare Of A Child, was not "vague". The Court stated:

> "A statute may be "vague" in the sense that it contains no ascertainable standard of conduct, or it may be "vague" in the sense that the ascertainable standard of conduct may or may not include certain types of conduct. **Smith v. Goguen**, 415 U.S. 566, 577-78, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974). If the statute contains no standard of conduct, or if the standard of conduct prohibits conduct

which is protected by the first amendment, the state will be declared unconstitutionally "vague" without regard to the particular conduct of the individual challenging the statute (hereinafter known as "facial vagueness") . . . If, however, the statute contains an ascertainable standard which does not infringe upon protected first amendment rights, the "vagueness" issue may be finally determined only with reference to the conduct of the person challenging the statute . . . When, as here, that conduct is not set out on the record, an appellate court can only determine whether the statute contains an ascertainable standard and whether the ascertainable standard infringes upon first amendment rights. We do not believe that the statute involved here is vague in either of these ways.

It must be borne in mind that we are dealing with a juvenile statute.

'The purpose of juvenile statutes, as the one at issue here, is basically protective in nature. Consequently, these statutes are designed to cover a broad range of conduct in order to safeguard the welfare and security of our children. Because of the diverse types of conduct that must be circumscribed, these statutes are necessarily drawn broadly. It clearly would be impossible to enumerate every particular type of adult conduct against which society wants its children protected. We have therefore sanctioned statutes pertaining to juveniles which proscribe conduct producing or tending to produce a certain defined result . . . rather than itemizing every undesirable type of conduct.'

> In **Commonwealth v. Randall**, 183 Pa. Super. 603, 611, 133 A.2d 276, 280 (1957), the Superior Court, upholding the broad purposes of one of our . . . juveniles statutes, noted:
>
> 'The common sense of the community, as well as the sense of decency, propriety and the morality which most people entertain is sufficient to apply the statute to each particular case, and to individuate what particular conduct is rendered criminal by it.'"
>
> "Thus, statutes such as the one at issue here are to be given meaning by reference to the "common sense of the community" and the broad protective purposes for which they are enacted. With these two factors in mind, we believe that Section 4304 is not facially vague. Phrases such as "endangers the welfare of the child" and "duty of care, protection or support" are not esoteric. Rather, they are easily understood and given content by the community at large. An individual who contemplates a particular course of conduct will have little difficulty deciding whether his intended act "endangers the welfare of the child" by his violation of a "duty of care, protection or support." Nor, it is clear, are first amendment rights involved."

It must be noted that the prosecution of the Barnharts is not because of their religious beliefs. If they choose to believe in or to follow a certain faith, that is their right. The Commonwealth is not interfering with their personal right not to seek

medical care for their own well being. They are being prosecuted for the manner in which they are requiring others, in this case, a two and a half year old minor who is absolutely and totally dependent on them for his survival, to die, the victim of their criminal negligence. They believe, but Justin must be the one to factually practice that belief by being denied the kind of medical help that a reasonable parent would provide under the same or similar circumstances.

As this Court stated in **In Re Gault**, 387 U.S. 1, S.Ct. 1428 (1967):

> "Whatever may be their precise impact, neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

The Barnharts are therefore stating that their right to practice their beliefs are without limitation even to the extent of denying a fellow citizen of the United States his rights, including the right to life, liberty and the pursuit of happiness.

In conclusion, the issue of vagueness in the factual context raised by the Appellants is outside of the

character of reasons that the Supreme Court should consider. However, a review of the "religious defense" issue presented by the Barnharts' factual situation will definitely decide an important question of federal law which the highest court has not yet considered.

Respectfully submitted,

/s/ Patrick T. Kiniry

Patrick T. Kiniry, Esq.

Attorney for Respondent

COMMONWEALTH OF PENNSYLVANIA:

: ss

COUNTY OF CAMBRIA :

AFFIDAVIT

I, Patrick T. Kiniry, First Assistant District Attorney of Cambria County, Pennsylvania, trial counsel in the above captioned matter, being duly sworn according to law, do hereby depose and say that I am a member in good standing of the Bar of the United States Supreme Court, having been admitted to practice on March 31, 1980; further that three true and correct copies of this Response were personally served upon the following counsel of record on July 7, 1988:

Bruce F. McKenrick, Esq.
109 South Center Street
Ebensburg, Pa. 15931

I do further certify that an original and forty copies of this Petition were mailed by express mail on July 7, 1988, addressed as follows:

Clerk of the United States Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

/s/ Patrick T. Kiniry

Patrick T. Kiniry, Esq.
Attorney for Respondent

Sworn to and subscribed before me
this 7th day of July, 1988

/s/ Tammy M. Krupa

Tammy M. Krupa, Notary Public
My Commission Expires October 9, 1989